GEORGE R. GALLAGHER
v.
U.S. POSTAL SERVICE

Docket No.
PH075209000

OPINION AND ORDER

In an appeal of a removal action based on off-duty misconduct, the Board's Philadelphia Field Office affirmed the dismissal of appellant George R. Gallagher from his position of Medical Officer with the U.S. Postal Service (the agency), based on the charge of "conduct unbecoming a postal employee" in violation of agency regulations. The appellant has filed a timely petition for review.

We hereby GRANT the petition for review in accordance with 5 U.C.S. 7701(e)(1) and 5 C.F.R. 1201.115.

I. BACKGROUND

In its advance notice of the proposed removal, the agency set forth the basis of the charge: The appellant had been indicted by a Federal grand jury in the Western District of Pennsylvania for 103 counts of mail fraud under 18 U.S.C. 1341, 84 counts of false statement under 18 U.S.C. 1001, and 17 counts of Medicare fraud under 42 U.S.C. 1395. After pleading guilty to one count of making a false statement under 18 U.S.C. 1001, in exchange for having the remaining 203 counts dropped, the appellant was sentenced to one year on probation and fined $5,000. During the course of these criminal proceedings, the appellant's name, the charges against him, and the ultimate outcome were widely publicized in the "Pittsburgh Post-Gazette" and in the "Pittsburgh Press." The advance notice of proposed removal concluded:

> In view of your unbecoming conduct as a private physician, it would not be in the best interest of the Postal Service to continue your employment in the highly respected position of Medical Officer. To do so would adversely affect the image of the Postal Service and subject the Postal Service to possible disrepute and loss of public confidence.

At the hearing on appeal, the agency introduced evidence establishing the appellant's indictment and conviction, and the ensuing publicity. The agency also introduced a copy of the position description for the appellant's former Medical Officer position, listing the following pertinent duties:

> Has regular contact with local and state and federal health agencies, hospitals, private physicians and counterparts in business regarding health programs. Attends medical society meetings.

> Maintains an effective working relationship with hospitals, local health agencies and physician [sic] in connection with the care and treatment of employees.
>
> Represents the Postal Service in medical and injury cases involving [former] Civil Service Commission and the Bureau of Employees Compensation.

These functions were confirmed by the oral testimony of the agency's director of employee and labor relations. Hearing Transcript at 7–10.

The appellant introduced a transcript of testimony adduced before a hearing examiner of the Pennsylvania State Board of Medical Education and Licensure. That testimony showed that the appellant's private patients had a high regard for his services, and that the one count of making a false statement to which he pled guilty involved a $10 claim filed with the Social Security Administration for a private house call that actually represented several telephone consultations with the same elderly patient. Additionally, the appellant and the agency entered into a stipulation that the appellant's prior job performance had no bearing on his removal. Hearing Transcript at 11.

Upon considering this evidence, the presiding official reached the following conclusion:

> I find that the agency evidence showing that because of the appellant's sensitive position as a Medical Officer, his plea of guilty could have a harmful effect on the reputation and ability of the Postal Service to perform its mission, outweighs the appellant's evidence showing good character and past satisfactory performance. I find, therefore, that the agency has established by a preponderance of the evidence that the appellant's removal, under the circumstances of this case, serves to promote the efficiency of the service.

Initial Decision at 3. He thus affirmed the removal action.

In the petition for review, the appellant asserted that the agency regulation prohibiting "conduct unbecoming a postal employee" is unconstitutionally vague, and that newspaper accounts constituting hearsay were wrongfully admitted into evidence. He contended, further, that there was no evidence showing a detrimental effect of the conduct at issue on the efficiency of the service, and that the presiding official erroneously concluded that his removal would promote the efficiency of the service. The appellant argued finally in his petition that the presiding official erroneously shifted the burden of proof from the agency to the appellant.

II. DISCUSSION

We find, first of all, that we need not reach the question of the constitutionality of the agency regulation relied upon in effecting the removal action herein appealed, because we are satisfied that it was not unconstitutionally vague as applied in this case. As in *Robinson v. Blount*,

472 F.2d 839, 844 (9th Cir. 1973), the charges against the appellant set forth in the advance notice of proposed removal were clear and specific, and informed the appellant of the reasons for his proposed removal. *See also Aiello v. City of Wilmington, Delaware*, 623 F.2d 845, 854–56 (3d Cir. 1980).

Second, with regard to the admissibility of the newspaper articles introduced into evidence by the agency, we find that they do not constitute hearsay because, as urged by the agency in its response to the petition, they were not introduced to establish the truth of the matters reported therein. *Wathen v. United States*, 527 F.2d 1191,1199 (Ct. Cl. 1975). The truth of those matters was established independently. The newspaper articles were introduced to show the notoriety of the appellant's indictment and conviction.[1] In any event, it has long been settled that the factfinder in an administrative adjudication may consider relevant and material hearsay evidence. *See, e.g., Johnson v. United States*, 628 F.2d 187, 190 (D.C. Cir. 1980), and cases cited therein. We find, therefore, that the newspaper articles were properly admitted into evidence.

We analyze appellant's third major contention, that the agency failed to establish a nexus between the conduct at issue and a detriment to the efficiency of the service, under the framework set out in *Merritt v. Department of Justice*, 6 MSPB 493 (1981), issued concurrently with this opinion. In that case we held that in some egregious circumstances a presumption of nexus may arise from the nature and gravity of the misconduct. *Id.*, 509. In considering whether such a presumption arises, "[t]he nature of the particular job as much as the conduct allegedly justifying the action has a bearing on whether the necessary relationship obtains." *Doe v. Hampton*, 566 F.2d 265, 272 n.20 (D.C. Cir. 1977).

Here appellant, a physician, pleaded guilty to felonious conduct directly relating to his professional responsibility. Moreover, it was in that same professional capacity as a physician that appellant acted both in performing the duties of his position as the agency's Medical Officer and in misstating the Social Security claim for which he was convicted. While employed as Medical Officer, the appellant also occupied a position of great responsibility and high visibility. He functioned as the agency's representative in Pittsburgh before local, state, and Federal health agencies, hospitals, medical societies, and private physicians. In order to continue functioning effectively in that capacity, the appellant had to maintain a public image of professional trustworthiness and propriety. *Cf. Yacovone v. Bolger*, No. 79-2043 (D.C. Cir. Feb. 20, 1981) (Slip Op.) (postmaster's position of high stature and fiduciary responsibility requires reputation for honesty and integrity); *Embrey v. Hampton*, 470

[1]The fact that the newspaper articles were indeed published and circulated as usual may be acknowledged by official notice, 5 C.F.R. 1201.67, given the stipulation as to their authenticity, Hearing Transcript at 3, and absent a showing to the contrary.

F.2d 146, 148 (4th Cir. 1972) (conviction for falsifying government documents goes to reliability, veracity, trustworthiness, and ethical conduct). Considering the nature and gravity of appellant's offense, and the professional capacity involved which was common to his agency position as well, we conclude that impairment of the efficiency of the public service may be presumed from such misconduct.

Such presumption, however, is rebuttable. *Merritt, supra*, 509. In this case, appellant introduced testimony establishing his continuing good reputation among his patients and the clergy for his competence and reliability as a physician. Additionally, through cross examination of an agency witness, he established that his performance as a Medical Officer with the Postal Service had always been satisfactory. This evidence, relating as it does to appellant's reputation only among his private patients and the clergy, and to his job performance prior to the time of his well-publicized conviction, does not substantially rebut the presumption of nexus in this case. There was no evidence offered to show that appellant's reputation had not been impaired among physicians, medical agencies and health officials. Furthermore, the agency submitted 13 newspaper articles concerning appellant's misconduct, in which his agency relationship is prominently mentioned. In the face of such notoriety, testimony on appellant's reputation and performance prior to his apprehension by the authorities is not persuasive.

When the appellant's indictment and conviction for professional improprieties were highly publicized in the Pittsburgh area, the appellant's public image was necessarily damaged, with a concomitant detrimental effect on his ability to perform his duties satisfactorily and on the agency's ability to accomplish its mission through him as its representative. *See Doe v. Hampton*, 566 F.2d at 272 n.20. As in *Wathen v. United States*, 527 F.2d at 1200–01, it was, in the final analysis, the adverse publicity that had an adverse effect on the efficiency of the service. *See also Norton v. Macy*, 417 F.2d 1161, 1166 (D.C. Cir. 1969). We find, therefore, that even allowing for appellant's rebuttal evidence, the agency has carried its burden of establishing that appellant's retention would impair the efficiency of the service.

III. CONCLUSION

Based on the foregoing analysis, we find that the agency has established the requisite nexus between the appellant's off-duty misconduct and the efficiency of the service by the preponderance of the evidence, and that the appellant's removal on that basis promotes the efficiency of the service.[2] 5 U.S.C. 7513(a). Accordingly, the initial decision dated October 3, 1979, is hereby AFFIRMED.

This is the final decision of the Merit Systems Protection Board in this appeal. The appellant is hereby notified of the right to seek judicial

[2]A separate view on the determination of nexus is set forth in the Opinion of Chairwoman Prokop Concurring in the Result in *Merritt v. Department of Justice*, 6 MSPB 493 (1981).

review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after the appellant's receipt of this order.

RUTH T. PROKOP.
ERSA H. POSTON.
RONALD P. WERTHEIM.

WASHINGTON, D.C., *June 8, 1981*